88-936

Supreme Court, U.S.
FILED
DEC 7 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. _____

IN THE SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1988

REINER SCHWARZ

Petitioner,

vs.

CITY OF WARWICK, ET ALS.

Respondents.

****

PETITION FOR A WRIT OF CERTIORARI

TO THE U.S. COURT OF APPEALS

FOR THE FIRST CIRCUIT

****

REINER SCHWARZ, PRO SE.

374 SEA VIEW DRIVE, WARWICK, R.I. 02886

Tel. 1-401-738-7648

To the Honorable Justices of the Supreme Court of the United States.

Questions presented

(1) Whether City of Warwick, R.I. and State of Rhode Island are liable to respond in damages for recurrent torts committed by their officials, employees under 42 USCA §1983, 42 USCS §1988, State of Rhode Island has abolished immunity (11th Amendment right) under R.I.G.L. §9-31-1 thru 12?

Decision of Monroe v. Pape (1961) 365 US 167, 5Led.2d 492, 81 S.ct. 473, to effect that only "persons" may be sued under 42 USCA §1983 cannot be avoided by applying state Law, supposedly pursuant to provisions of 42 USCS §1988, waiving immunity to suit and allowing municipal liability for torts committed by city officials, employees Wilcher v. Gain (1970, DC Cal) 311 F Supp 754.

In order to vindicate rights conferred by various civil rights acts, 42 USCS §1988 authorizes federal courts, where federal Law is unsuited or insufficient to furnish suitable remedies, to look to principles of common Law, as altered by state Law. Runyon v. McCrary (1976) 427 US 160, 49 L ed. 2d 415, 96 S Ct. 2586.

42 USCA §1983 protects people from unconstitutional actions under color of State Law, whether that action be executive, Legislative, or judicial. Mitchum v. Foster (1972) 407 US 225, 32 L Ed. 2d 705, 92 S Ct 2151.

42 USCS §1988 relates to the question of damages once liability has been established; it is not relevant to determination of a motion to dismiss for failure to state a claim. Johnson v. Marton (1972, DC NY) 55 FRD 282.

The amount of damages to be recovered by the injured individual is not to vary

because of the Law of the state in which the federal court suit was brought; the federal common Law of damages is to be applied, and such Law permits the recovery of exemplary damages. Basista v. Weir (1964, CA 3 PA) 340 F 2d 74.

List of parties

Authors of Exhibit I. and Exhibit II.

(1) City of Warwick, R.I. Police Dept.

(2) State of Rhode Island

(3) Warwick Police Officer,
Alexander Goula.

(4) Assistant Attorney General of State of Rhode Island,
Kenneth P. Madden.

(5) Warwick Police Officer,
Ralph Barron, Jr.

(6) Warwick Police Captain,
Richard Bowen.

(7) State of Rhode Island Judge,
Victor Beretta.

(8) Warwick Dectective,

Worrall.

(9) Warwick Detective,

Pendergast.

(10) Warwick Police Officer,

Hastings.

Table of Contents

Questions presented. i

List of parties. . . . . .iii, iv

Table of authorities . . . . . .vi, vii

Opinion below. 1,2

Jurisdiction 2

Statement of the case. 2,3,4

Federal consideration. 4

Statement of facts 4, 5, 6

Reason for grating Writ. 6,7

Conclusion 7

Appendix

Certification

Table of authorities

Related cases:

Basista v. Weir
(1964, CA 3PA) 340 F2 d 74. iii

Johnson v. Marton,
(1972, DC NY) 55 FRD 282. ii

Mitchum v. Foster,
(1972) 407 US 225, 32 Led 2d 705,
92 SCt 2151 ii

Monroe v. Pape,
(1961) 365 US 167, 5 Led 2d 492,
81 SCt. 473 i

Runyon v. McCrary,
(1976) 427 US 160, 49 Led 2d 415,
96 SCt 2586 ii

Wilcher v. Gain,
(1970), DC Cal) 311 F Supp 754. . . i

STATUTES:

42 USCA §1983, Amend. 14, §1. . . . i,ii, 3,4

42 USCS § 1988. . . . . i,ii, 3,4

11th Amend. and R.I.G.L. §9-31-1
thru12, tort liability. . . . . i, 3, 4

28 USC § 1254 (3) 2

28 USC § 1651 (a) 2

CONSTITUTIONS:

Art.III, Sec. 2
United States Constitution, 4th
6th, 13th, 14th Amendments 4,5

No. _____

IN THE SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1988

REINER SCHWARZ

Petitioner,

vs.

CITY OF WARWICK, ET ALS.

Respondents.

PETITION FOR A WRIT OF CERTIORARI

TO THE U.S. COURT OF APPEALS

FOR THE FIRST CIRCUIT

Opinion below

See Appendix for opinions of: U.S. District Court for the District of Rhode Island, Reiner Schwarz v. City of Warwick, et al. C.A. No. 87-0370P.

U.S. Court of Appeals for the First Circuit, Reiner Schwarz v. City of Warwick, et al. file No. 88-1038, and No. 88-1786.

Jurisdiction

Jurisdiction for Writ of Certiorari is conferred on this Court by 28 USC §1254 (3) 28 USC §1651 (a).

Statement of the case

On July 7, 1987, in the U.S. District Court for the District of Rhode island, I filed an action for the recovery of exemplary damages against officials, employees of the city of Warwick Police Department and officials, employees of the State of Rhode Island arising from deprivation of my rights to Life, personal Liberty, and property, without due course of Law, (without probable cause and without warrant); recurrent abuses against me, effected under "color of State Law" of the State of Rhode Island, amounting to "custom or usage"

within meaning of 42 USCA § 1983, 42 USCS §1988 and R.I.G.L. §9-31-1 thru 12.

On November 10, 1987 the District Court dismissed my claim stating that I was not entitled to relief.

On February 1, 1988 I filed an appeal in the U.S. Court of Appeals for the First Circuit.

On March 30, 1988 the Appellate Court dismissed my appeal for lack of jurisdiction.

On April 4, 1988 I filed a motion to enter final judgment (under Rule 54 (b) with the District Court.

On June 9, 1988 the District Court dismissed my claim stating that I was not entitled to relief.

On August 16, 1988 I filed a second appeal in the U.S. Court of Appeals.

On October 5, 1988 the Appellate Court dismissed my appeal and affirmed the District Court Orders.

On October 13, 1988 I field a petition for rehearing in the U.S. Court of Appeals.

On October 28, 1988 the Appellate Court denied my petition for rehearing. See Appendix.

Federal considerations

Civil action for deprivation of any rights, privileges, or immunities secured and protected by the Constitution of the United States. 42 USCA §1983, Amend. 14, §1.

Vindication of civil rights 42 USCS §1988, R.I.G.L. §9-31-1 thru 12. tort liability.

Due course of Law, 4th, 6th, 13th, and 14th Amendments to the United States Constitution.

Statement of facts

The State of Rhode Island criminal affidavit Exhibit I., and City of Warwick Police Department criminal complaint

Exhibit II. against me are both insufficient, a fatal jurisdictional defect; respondents' affidavit and complaint fail to describe a crime, entire lack of evidence.

There is no sworn statement of probable cause, no sworn supporting statements, the respondents do not speak from personal knowledge, there is no evidence at all, no material fact stated in the affidavit and complaint (required by the 4th, 6th, 13th, and 14th Amendments to the Constitution) that the respondents involved in this case are entitled to arrest me at my home twice, to take my property, to put me in jail twice, to take pictures and fingerprints of me twice, to commit me to the mental hospital, to institute criminal prosecution against me, to force me post bail, surety bonds, to subject me to a criminal trial, to summon me to court 15 times, against my will. I have an impeccable record, I did not violate any Law. (emphasis added)

See Exhibit I. and Exhibit II. placed in the custody of the Clerk of this Court for inspection on November 10, 1988.

The respondents involved in this case have in fact no jurisdiction to do what they did to me.

Such being the fact, the numerous cases relied on by respondents involved have no application. The judgment below should be reversed.

As a result of respondents involved conduct against me I suffer mental anguish, shame and degradation, nervousness, upset condition, loss of my finances, injury to my reputation and, I have lost my job.

I respectfully ask this Honorable court to please grant me an award of damages for injury to my person and, injury to my rights.

Reasons for granting Writ

(1) I cannot get relief from any other Court.

(2) The substantive Law grants me a right to relief.

Conclusion

For the reasons stated above, petitioner requests that this application for writ of certiorari be granted.

Reiner Schwarz, pro se
374 Sea View Drive
Warwick, RI 02886
(401) 738-7648

Reiner Schwarz pro se

Subscribed and sworn
before me this 21st
day of November
1988

Notary Public

My Commission Expires June 30, 19[illegible]

Appendix

DISTRICT COURT OF THE UNITED STATES

FOR THE DISTRICT OF RHODE ISLAND

REINER SCHWARZ	)	
	)	CIVIL ACTION
v.	)	No. 87-0370P
	)	
CITY OF WARWICK, et al.	)	Filed on July 7, 1987

MEMORANDUM AND ORDER

The vague complaint in this case attempts to set forth a claim against the City of Warwick and the State of Rhode Island premised on 42 U.S.C. §1983 and 42 U.S.C. §1988. On November 10, 1987 by way of a Memorandum and Order I dismissed the claims against the City of Warwick.[1] Adopting the "Discussion" and "Facts" set forth in November 10, 1987 Memorandum and Order and for the reasons that follow, I now grant the State's Motion to dismiss the claim against the State of Rhode Island.

Disscussion

As far as I can determine, the claim

against the State of Rhode Island supposedly arises from the conduct of a State Court Judge who, the complaint claims, "wilfully and without cause committed (him) to (a) mental hospital on 200 dollars cash surety bond." Complaint at p.3. He further alleges "Unlawful and malicious use and abuse of process, malicious prosecution" in that he was "held in State of Rhode Island custody for over 3 years on 300 dollars and 200 dollars respectively own recognizance and prosecuted without due process of law, in violation of my federal constitutional rights." Id. at 3. The foregoing is the sum total of the grievance against the state.

1/ For ease of the reader a copy of said Memorandum and Order is appended hereto and made a part hereof.

To begin with, it is unclear to me if, indeed, the State is a party defendant since the complaint speaks to the misconduct of the police excepting for his grievance against the state judge. Nevertheless, the State Attorney General was served with a summons and a complaint, and the State did file an answer followed by this Motion to Dismiss.

The claim against the judge is utterly devoid of any merit because, as the defendant states, of judicial immunity arising "out of the performance of his... judicial functions."

> The governing principle of law is well established and is not questioned by the parties. As early as 1872, the Court recognized that it was "a general principle of the highest importance to the proper administration of justice that a judicial officer, in exercising the authority vested in him, (should) be free to act upon his own convictions, without apprehension of personal consequences to himself." Bradley v. Fisher, supra, at 347. For that reason the Court held that "judges of courts of superior or

> general jurisdiction are not liable to civil actions for their judicial acts, even when such acts are in excess of the jurisdiction, and are alleged to have been done maliciously or corruptly." 13 Wall., at 351. Later we held that this doctrine of judicial immunity was applicable in suits under § 1 of the Civil Rights Act of 1871, 42 U.S.C. § 1983, for the legislative record gave no indication that Congress intended to abolish this long-established principle. Pierson v. Ray, 386 U.S. 547, 87 S.Ct. 1213, 18 L.Ed.2d 288 (1967).
>
> Stump v. Sparkman, 435 U.S. 349, 357, 98 S.Ct. 1099, 1104 (1978).
>
> A judge will not be deprived of immunity because the action he took was in error, was done maliciously, or was in excess of his authority; rather he will be subject to liability only when he has acted in the "clear absence of all jurisdiction."
>
> Id. at 1105.

This action taken here was clearly within the scope of the state judge's judicial capacity. And if the complaint is attempting to include prosecutors, it too must fall as to them. Imber v. Pachtmon, 424 U.S. 409, 431 (1986); Siano v Justices of Massachusetts, 698 F.2d 52, 57 (1st Cir.

1983),

> When initiating, a prosecution and presenting the state's case, a prosecutor is absolutely immune from a civil suit for damages under section 1983.

For the reasons the plaintiff's case did not survive against the City of Warwick, the same applies to the State. Siano, supra, also tells us that to "prevail upon his section 1983 claim (Schwarz) must demonstrate that the (judge) acting under color of (Rhode Island) law deprived him of a right secured by the federal Constitution or federal law." Siano, supra, at 56.

The amorphous nature of the plaintiff's complaint simply cannot and should not be accepted; as I have already stated there are limits to the indulgences a court must give to pro se petitions; but some standards must apply. A court cannot accept a shotgun broad accusation as exists in this case.

My November 10, 1987 Memorandum and Order, recited in the margin hereof as n. 1, speaks to the malicious prosecution claim and so I will not needlessly repeat myself here.

The action against the State of Rhode Island is hereby dismissed.

By Order,

_____
Deputy Clerk

Enter:

_____

Senior U.S. District Judge

June 9, 1988

DISTRICT COURT OF THE UNITED STATES

FOR THE DISTRICT OF RHODE ISLAND

REINER SCHWARZ	)	
	)	C.A. No.
v.	)	87-0370 P
	)	
CITY OF WARWICK, ET AL.	)	Filed on July 7, 1987

MEMORANDUM AND ORDER

This is a claim against the City of Warwick, Rhode Island arising under 42 U.S.C §1983 and 42 U.S.C. §1988. For the reasons that follow, I dismiss the claim.

I. FACTS

Plaintiff, appearing pro se, filed his Complaint on July 7, 1987, alleging that officers of the Warwick Police Department, without warrant or probable cause, entered his home on two occasions, February 29, 1984 and September 2, 1984, searched, arrested, and then later briefly jailed him. Plaintiff contends that this conduct constitutes false arrest and imprisonment cognizable under 42 U.S.C.§ 1983. Plaintiff

also alleges malicious prosecution, although the facts underlying this claim are decidedly unclear.

II. DISCUSSION

I must, of course, interpret the complaint, including all facts and reasonable inferences, in the light most favorable to the plaintiff. Harpur v. Csert, 544 F.2d 1121, 1122 (1st Cir. 1976). "Only if it appears beyond doubt from the pleadings that the party opposing the motion can prove no set of facts which would support the claim for relief may the court grant the motion." Lopez v. Bulova Watch Co., Inc., 582 F.Supp. 755, 757 (D.R.I. 1984). I am also mindful that because this is a pro se complaint, it is held to "less stringent standards than pleadings drafted by lawyers." Sisbarro v. Warden, Mass. State Penitentiary, 592 F.2d 1, 2 (1st Cir. 1979).

I am forced to conclude, however, even

in light of these not insubstantial indulgences, that plaintiff's section 1983 action against the Town of Warwick must be dismissed for failing to allege that the actions of the officers were actuated by or stemmed from a custom or policy.

In Monell v. Dept. of Soc. Serv., 436 U.S. 658 (1978), the Supreme Court rejected a straight respondeat superior theory of municipal liability for the acts of its agent and held that "it is when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the government is responsible under § 1983." Id. at 695.

The Supreme Court has had occasion to review the sufficiency of a complaint in this regard. In Polk County v. Dodson, 454 U.S. 312 (1981), a pro se plaintiff had failed, as the plaintiff has in this case,

to allege any policy of the municipality that arguably violated his rights. According to the Court, "even in the light of the sympathetic pleading requirements, applicable to pro se petitioners, the complaint did not describe a constitutional tort actionable under §1983."

As the Court stated, "official policy must be the 'moving force of the constitutional violation' in order to establish liability of a governmental body under §1983." Id. at 327 (citing Monell, 436 U.S. at 694); see also Scarpe v. Murphy, 624 F.Supp. 33, 35 (D. Mass. (1985) ("since 'the touchstone of the §1983 action against a government body is an allegation that official policy is responsible for a deprivation of rights protected by the constitution', a plaintiff must plead policy in his §1983 complaint.").

Plaintiff also alleges, or attempts to allege, malicious prosecution against

the city. Try as I might, I am unable to understand the basis of this claim. The plaintiff appears to allege that the malicious prosecution occured on December 14, 1984, and states that it was on this date that he was pronounced not guilty. Yet, in the very next sentence he speaks of being "in State of Rhode Island custody for three years on 3000 dollars and 2000 dollars respectively own recognizance" and further complains of having to appear in court on fifteen occasions between April 3, 1984 and May 21, 1986.

While I am willing to adhere to a less stringent standing standard of pleading for pro se litigants, I must agree with my brother Young of the district court of Massachusetts, that "this cannot be taken to mean that pro se complaints are held to no standard at all." Green v. Com. of Mass., 108 F.R.D. 217, 218 (D.Mass. 1985). The controlling rule requires a

short, plain statement of the claim showing that the pleader is entitled to relief. Fed.R.Civ.P. 8(a) (2). "(C)omplaints which ramble, which needlessly speculate, accuse and condemn, and which contain circuitous diatribes far removed from the heart of the claim do not comport with these goals and this system; such complaints must be dismissed....." Id. (quoting Prezzi v. Berzak, 57 F.R.D. 149, 151-52 (S.D.N.Y. 1972)).

III. CONCLUSION

Accordingly, plaintiff's complaint against the City of Warwick is dismissed.

By Order

_____

Clerk

Enter

_____

Senior Judge

November 10, 1987

UNITED STATES COURT OF APPEALS

FOR THE FIRST CIRCUIT

No. 88-1038

Filed on Feb. 1, 1988

REINER SCHWARZ
Plaintiff, Appellant,

v.

CITY OF WARWICK, ET AL.,
Defendants, Appellees.

Before
Breyer, Torruella and Selya,
Circuit Judges.

ORDER OF COURT

Entered March 30, 1988

Upon consideration of appellee the State of Rhode Island's motion for Summary dismissal of this appeal, and of appellant's response to this court's order to show cause why this appeal should not be dismissed for lack of jurisdiction, the appeal is dismissed. At the time the notice of appeal was filed, the district court had not acted on appellant's claims against the State of Rhode Island.

Accordingly, the district court order appealed from dismissing appellant's claims against the City of Warwick, is not a final judgment disposing of all claims against all parties. Nor did the district court expressly direct the entry of final judgment as to these latter claims under Fed.R.Civ.P. 54 (b). The order appealed from therefore is not appealable as a final judgment under 28 U.S.C. §1291.

Contrary to appellant's contention, this court cannot invoke jurisdiction under 28 U.S.C. §1291(b). The district court must first state in writing that an interlocutory appeal is appropriate under the criteria set out in § 1292(b) before this court may, in its discretion, permit such an appeal. The district court has not done so.

Appellees' motion for summary dismissal of this appeal is granted. The appeal is dismissed.

By the Court:

Clerk.

(cc: Messr. Davey; Ms. Fobert and Mr. Schwarz)

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 88-1786
Filed on August 16, 1988

REINER SCHWARZ,
Plaintiff, Appellant,

v.

CITY OF WARWICK, ET AL.,
Defendants, Appellees

Before

Bownes, Breyer and Selya,
Circuit Judges.

ORDER OF COURT

Entered October 5, 1988

The defendants have each moved to dismiss the appeal. We find merit to their contention that the appeal is untimely. Even if timely however, based on a review of the record and the appellant's brief on appeal, we find nothing which warrants disturbing the distric court's orders of dismissal. We, therefore,

affirm the district court orders essentially for the reasons stated in those orders of dismissal dated November 10, 1987 and June 9, 1988. Loc.R. 27.1. The City of Warwick's request for costs and attorney's fees is denied.

Appeal dismissed.

By the Court:

Clerk.

(cc: Messrs. Schwarz, Davey and Ms. Fobert)

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 88-1786
Filed on Oct. 13, 1988

REINER SCHWARZ,
Plaintiff, Appellant,

v.

CITY OF WARWICK, ET AL.,
Defendants, Appellees.

Before

Bownes, Breyer and Selya,
Circuit Judges.

ORDER OF COURT

Entered October 28, 1988

The petition for rehearing is denied.

By the Court:

FRANCIS P. SCIGLIANO,
Clerk

By: _____
Chief Deputy Clerk.

(cc: Messrs. Schwarz, Davey and Fobert)

Certification

I have sent three true copies of this petition for writ of certiorari to: by certified mail.

Dorothy Fobert, Assistant Attorney General, 72 Pine Street, Providence, RI 02903.

John A. Davey, Jr., Esq., Olenn and Penza, 1246 Chalkstone Avenue, Providence, RI 02908.

Reiner Schwarz, pro se
374 Sea View Drive
Warwick, RI 02886
(401) 738-7648

Reiner Schwarz pro se

Subscribed and sworn before me this 21st day of November 1988

Notary Public

My Commission Expires June 30, 19[illegible]

Supreme Court, U.S.
FILED
JAN 3 1989
JOSEPH F. SPANIOL, JR.
CLERK

(2)

No. 88-936

In The

Supreme Court of the United States

October Term, 1988

REINER SCHWARZ,

Petitioner,

v.

CITY OF WARWICK, et al,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

RESPONDENT STATE OF RHODE ISLAND'S BRIEF IN OPPOSITION

JAMES E. O'NEIL
ATTORNEY GENERAL
of the STATE OF RHODE ISLAND

RICHARD B. WOOLLEY
Assistant Attorney General
72 Pine Street
Providence, RI 02903
(401) 274-4400
Attorneys for the Respondent State of Rhode Island

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

20pp

QUESTIONS PRESENTED

Did the Petitioner's failure to file a timely appeal deprive the Court of Appeals of jurisdiction?

Did the Petitioner fail to set forth a legally cognizable claim pursuant to 42 U.S.C. § 1983 against the Respondent State of Rhode Island?

LIST OF PARTIES

City of Warwick, Rhode Island
State of Rhode Island

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

LIST OF PARTIES ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES iv

OPINIONS AND JUDGMENTS BELOW 1

JURISDICTION 1

STATUTORY PROVISIONS INVOLVED 1

STATEMENT OF THE CASE 3

ARGUMENT 5

I. THE COURT OF APPEALS PROPERLY DISMISSED PETITIONER'S APPEAL FOR THE REASON THAT THE APPEAL WAS UNTIMELY AND THEREFORE DEPRIVED THE COURT OF JURISDICTION 5

II. THE PETITIONER'S COMPLAINT FAILED TO SET FORTH A LEGALLY COGNIZABLE CLAIM PURSUANT TO 42 U.S.C. § 1983 AGAINST THE STATE OF RHODE ISLAND 6

CONCLUSION 7

TABLE OF AUTHORITIES

Page

CASES

Browder v. Director, Department of Corrections of Illinois, 434 U.S. 257 (1978) 5

Imbler v. Pachtman, 424 U.S. 409 (1976) 6

Martinez v. Winner, 548 F.Supp. 278 (D.Col. 1982) 7

Rivera v. M/T Fossarina, 840 F.2d 152 (1st Cir. 1988) 5

Siano v. Justices of Massachusetts, 698 F.2d 52 (1st Cir. 1983) 6

Stump v. Sparkman, 435 U.S. 349 (1978) 6

United States v. Zuleta-Molina, 840 F.2d 157 (1st Cir. 1988) 5

STATUTES

28 U.S.C. § 1254(1) 1

28 U.S.C. § 2107 ..... 1, 5

42 U.S.C. § 1983 ..... 2, 3, 6, 7

OTHER

Fed.R.App.P. 4(a) 5

OPINIONS AND JUDGMENTS BELOW

Schwarz v. City of Warwick, et al., No. 88-1786 (1st Cir. Oct. 5, 1988)

Schwarz v. City of Warwick, et al., No. 87-0370-P (D.R.I. June 9, 1988)

JURISDICTION

Jurisdiction of this Court is invoked by a petition for a writ of certiorari pursuant to 28 U.S.C. § 1254(1). Petitioner seeks review of the dismissal, by the United States Court of Appeals for the First Circuit, of his appeal from a judgment of the United States District Court for the District of Rhode Island dismissing his complaint. The United States Court of Appeals for the First Circuit dismissed petitioner's appeal by order entered on October 5, 1988. Petitioner's petition for re-hearing was denied by the court of appeals on October 28, 1988.

STATUTORY PROVISIONS INVOLVED

28 U.S.C. § 2107 TIME FOR APPEAL TO COURT OF APPEALS

Except as otherwise provided in this section, no appeal shall bring any judgment, order or decree in an action, suit or proceeding of a civil nature before a court of appeals for review unless notice of appeal is filed, within thirty days after the entry of such judgment, order or decree.

In any such action, suit or proceeding in which the United States or an officer or agency thereof is a party,

the time as to all parties shall be sixty days from such entry.

In any action, suit or proceeding in admiralty, the notice of appeal shall be filed within ninety days after the entry of the order, judgment or decree appealed from, if it is a final decision, and within fifteen days after its entry if it is an interlocutory decree.

The district court may extend the time for appeal not exceeding thirty days from the expiration of the original time herein prescribed, upon a showing of excusable neglect based on failure of a party to learn of the entry of the judgment, order or decree.

This section shall not apply to bankruptcy matters or other proceedings under Title 11.

42 U.S.C. § 1983 CIVIL ACTION FOR DEPRIVATION OF RIGHTS

Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF THE CASE

This is an action for alleged deprivation of civil rights brought pursuant to 42 U.S.C. § 1983. In a complaint captioned *"Reiner Schwarz v. City of Warwick, et al.,"* the petitioner, appearing pro se, alleged, in substance, that he had been the subject of unlawful arrest and detention and malicious prosecution. The allegations of petitioner's complaint apparently stemmed from his encounters, on two separate occasions, with members of the police department of the City of Warwick, Rhode Island.

Based upon a review of the complaint, it was unclear whether the State of Rhode Island (the State) was a co-defendant. The complaint neither specifically named the State as a defendant nor contained any allegations expressly directed against the State. However, a summons and a copy of the complaint were served upon the Attorney General of the State of Rhode Island. Accordingly, the State filed an answer.

On November 10, 1987, the United States District Court for the District of Rhode Island dismissed petitioner's claim against the City of Warwick (the City). In substance, the district court concluded that the complaint failed to state a claim against the City upon which relief could be granted. Petitioner then filed an appeal from the district court's order in the United States Court of Appeals for the First Circuit.

By order entered on March 30, 1988, the court of appeals summarily dismissed petitioner's appeal for the reason that the district court's order did not dispose of all

claims against all parties and therefore was not appealable as a final judgment.

Thereafter, the State filed a motion in the district court seeking dismissal of petitioner's complaint, if any, against the State. By order entered on June 9, 1988, all remaining claims, specifically those directed against the State, were dismissed. (App. 2, 5). In dismissing petitioner's complaint against the State, the district court noted that it was indeed unclear whether the State was a co-defendant. (App. 3). In any event, the court concluded that the complaint failed to set forth any claim against the State upon which relief could be granted. (App. 3-5). The court determined that, to the extent that the complaint included claims directed against the State, such claims were founded upon allegations of malicious prosecution and upon an allegation that a Rhode Island state court judge willfully and without cause ordered the petitioner held in a mental hospital in lieu of $200.00 cash surety bond. The district court, citing applicable case law, held that such claims were precluded by the doctrines of judicial and prosecutorial immunity. (App. 3-4).

On July 22, 1988, forty-three days after the district court's entry of its most recent order of dismissal, petitioner filed an appeal to the First Circuit Court of Appeals. Both the City and the State moved to dismiss the appeal.

By order entered on October 5, 1988, the court of appeals dismissed the appeal and affirmed the district court's orders of dismissal. (App. 1). In so doing, the court of appeals found that the petitioner's appeal was untimely. (App. 1). Further, even if considered timely

filed, the court found nothing which warranted disturbing the district court's orders of dismissal. (App. 1).

Thereafter, on December 7, 1988, the instant petition for a writ of certiorari to the United States Court of Appeals for the First Circuit was filed.

ARGUMENT

I. THE COURT OF APPEALS PROPERLY DISMISSED PETITIONER'S APPEAL FOR THE REASON THAT THE APPEAL WAS UNTIMELY AND THEREFORE DEPRIVED THE COURT OF JURISDICTION.

Pursuant to Fed.R.App.P. 4(a) and 28 U.S.C. § 2107, in a civil case, a notice of appeal to the court of appeals must be filed within 30 days after entry of the judgment or order from which the appeal is taken. This time limit is mandatory and jurisdictional. *Browder v. Director, Department of Corrections of Illinois*, 434 U.S. 257, 264 (1978) (*quoting, United States v. Robinson*, 361 U.S. 220, 229 (1960)). Thus, failure to file a timely notice of appeal deprives the appellate court of jurisdiction. *Browder*, 434 U.S. at 265; *United States v. Zuleta-Molina*, 840 F.2d 157, 158 (1st Cir. 1988); *Rivera v. M/T Fossarina*, 840 F.2d 152, 156 (1st Cir. 1988).

Accordingly, the petitioner not having filed a notice of appeal within the requisite 30-day time period, the court of appeals lacked appellate jurisdiction.

II. THE PETITIONER'S COMPLAINT FAILED TO SET FORTH A LEGALLY COGNIZABLE CLAIM PURSUANT TO 42 U.S.C. § 1983 AGAINST THE STATE OF RHODE ISLAND.

The district court determined that, to the extent that petitioner's complaint included claims directed against the State, such claims were founded upon allegations of malicious prosecution and upon an allegation that a Rhode Island state court judge willfully and without cause ordered the plaintiff held in a mental hospital in lieu of $200.00 cash surety bond. The court of appeals and the district court correctly determined that such claims were precluded by the doctrines of judicial and prosecutorial immunity.

When initiating a prosecution and presenting a case, a prosecutor is absolutely immune from liability for damages under § 1983. *Imbler v. Pachtman*, 424 U.S. 409, 431 (1976); *Siano v. Justices of Massachusetts*, 698 F.2d 52, 57 (1st Cir. 1983). This immunity is applicable even when the prosecutor's actions were undertaken maliciously, intentionally, or in bad faith. *Siano*, 698 F.2d at 58 (*quoting*, *Norton v. Liddel*, 620 F.2d 1375, 1379 (10th Cir. 1980)). Accordingly, petitioner's allegation that he was the victim of malicious prosecution cannot form the basis of a legally cognizable claim under § 1983.

Similarly, a judge is absolutely immune from liability for damages for § 1983 actions arising out of the performance of his or her judicial functions unless the judge acted "in the clear absence of all jurisdiction." *Stump v. Sparkman*, 435 U.S. 349, 357 (1978). A judge is absolutely immune from liability for his or her judicial acts even where the exercise of judicial authority is flawed by the

commission of grave procedural errors. *Id.* at 359. A judge is immune from liability even when the action taken was in error, was done maliciously, or was in excess of judge's authority. *Id.* at 356-357; *Martinez v. Winner,* 548 F.Supp. 278, 292 (D.Col. 1982).

In the instant matter, petitioner challenged the propriety of actions taken by a state court judge which were, without dispute, undertaken within the scope of the judge's judicial capacity. Accordingly, petitioner's complaint failed to set forth a legally cognizable claim under 42 U.S.C. § 1983.

CONCLUSION

For the above reasons, the Respondent State of Rhode Island respectfully requests that the petition for a writ of certiorari be denied.

Respectfully submitted,

STATE OF RHODE ISLAND

By Its Attorney,

JAMES E. O'NEIL
Attorney General
of the State of Rhode Island

RICHARD B. WOOLLEY
Assistant Attorney General
72 Pine Street
Providence, RI 02903
(401) 274-4400
Attorneys for the Respondent

APPENDIX 1

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 88-1786

REINER SCHWARZ,
Plaintiff, Appellant,

v.

CITY OF WARWICK, ET AL.,
Defendant, Appellant.

Before

Bownes, Breyer and Selya,
Circuit Judges.

ORDER OF COURT

Entered October 5, 1988

The defendants have each moved to dismiss the appeal. We find merit to their contention that the appeal is untimely. Even if timely however, based on a review of the record and the appellant's brief on appeal, we find nothing which warrants disturbing the district court's orders of dismissal. We, therefore, affirm the district court orders essentially for the reasons stated in those orders of dismissal dated November 10, 1987 and June 9, 1988. Loc.R. 27.1. The City of Warwick's request for costs and attorney's fees is denied.

Appeal dismissed.

By the Court:

Daniel P. Loughry
Clerk.

[cc: Messrs. Schwartz, Davey and Ms. Fobert]

APPENDIX 2

DISTRICT COURT OF THE UNITED STATES

FOR THE DISTRICT OF RHODE ISLAND

REINER SCHWARZ)
)
v.)
)
CITY OF WARWICK,) C. A. No. 87-0370 P
et al.)

MEMORANDUM AND ORDER

The vague complaint in this case attempts to set forth a claim against the City of Warwick and the State of Rhode Island premised on 42 U.S.C. §1983 and 42 U.S.C. §1988. On November 10, 1987 by way of a Memorandum and Order I dismissed the claims against the City of Warwick.[1] Adopting the "Discussion" and "Facts" set forth in my November 10, 1987 Memorandum and Order and for the reasons that follow, I now grant the State's Motion to dismiss the claim against the State of Rhode Island.

Discussion

As far as I can determine, the claim against the State of Rhode Island supposedly arises from the conduct of a State Court judge, who, the complaint claims, "wilfully and without cause committed [him] to [a] mental hospital on 200 dollars cash surety bond." Complaint at p.3. He further alleges "Unlawful and malicious use and abuse of

---

[1] For ease of the reader a copy of said Memorandum and Order is appended hereto and made a part hereof.

process, malicious prosecution" in that he was "held in State of Rhode Island custody for over 3 years on 300 dollars and 200 dollars respectively own recognizance and prosecuted without due process of law, in violation of my federal constitutional rights." *Id.* at 3. The foregoing is the sum total of the grievance against the state.

To begin with, it is unclear to me if, indeed, the state is a party defendant since the complaint speaks to the misconduct of the police excepting for his grievance against the state judge. Nevertheless, the State Attorney General was served with a summons and a complaint, and the State did file an answer followed by this Motion to Dismiss.

The claim against the judge is utterly devoid of any merit because, as the defendant states, of judicial immunity arising "out of the performance of his . . . judicial functions."

> The governing principle of law is well established and is not questioned by the parties. As early as 1872, the Court recognized that it was "a general principle of the highest importance to the proper administration of justice that a judicial officer, in exercising the authority vested in him, [should] be free to act upon his own convictions, without apprehension of personal consequences to himself." *Bradley v. Fisher, supra,* at 347. For that reason the Court held that "judges of courts of superior or general jurisdiction are not liable to civil actions for their judicial acts, even when such acts are in excess of the jurisdiction, and are alleged to have been done maliciously or corruptly." 13 Wall., at 351. Later we held that this doctrine of judicial immunity was applicable in suits under §1 of the Civil Rights Act of 1871, 42 U.S.C. §1983, for the legislative record gave no indication

> that Congress intended to abolish this long-established principle. *Pierson v. Ray*, 386 U.S. 547, 87 S.Ct. 1213, 18 L.Ed.2d 288 (1967).
>
> *Stump v. Sparkman*, 435 U.S. 349, 357, 98 S.Ct. 1099, 1104 (1978).
>
> A judge will not be deprived of immunity because the action he took was in error, was done maliciously, or was in excess of his authority; rather he will be subject to liability only when he has acted in the "clear absence of all jurisdiction."
>
> *Id.* at 1105.

The action taken here was clearly within the scope of the state judge's judicial capacity. And if the complaint is attempting to include prosecutors, it too must fall as to them. *Imbler v. Pachtmon*, 424 U.S. 409, 431 (1986); *Siano v. Justices of Massachusetts*, 698 F.2d 52, 57 (1st Cir. 1983),

> When initiating, a prosecution and presenting the state's case, a prosecutor is absolutely immune from a civil suit for damages under section 1983.

For the reasons the plaintiff's case did not survive against the City of Warwick, the same applies to the State. *Siano, supra*, also tells us that to "prevail upon his section 1983 claim [Schwarz] must demonstrate that the [judge] acting under color of [Rhode Island] law deprived him of a right secured by the federal Constitution or federal law." *Siano, supra*, at 56.

The amorphous nature of the plaintiff's complaint simply cannot and should not be accepted; as I have already stated there are limits to the indulgences a court must give to *pro se* petitions; but some standards must apply. A court cannot accept a shotgun broad accusation as exists in this case.

My November 10, 1987 Memorandum and Order, recited in the margin hereof as n. 1, speaks to the question of malicious prosecution claim and so I will not needlessly repeat myself here.

The action against the State of Rhode Island is hereby dismissed.

By Order,
/s/Paulette J. Dube
Deputy Clerk

Enter:

/s/Raymond J. Pettine
Senior U.S. District Judge
June 9/88

DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF RHODE ISLAND

REINER SCHWARZ)
)
v.)
)
CITY OF WARWICK,) C. A. No. 87-0370 P
et al.)

MEMORANDUM AND ORDER

This is a claim against the City of Warwick, Rhode Island arising under 42 U.S.C. §1983 and 42 U.S.C. §1988. For the reasons that follow, I dismiss the claim.

I. FACTS

Plaintiff, appearing pro se, filed his Complaint on July 7, 1987, alleging that officers of the Warwick Police

Department, without warrant or probable cause, entered his home on two occasions, February 29, 1984 and September 2, 1984, searched, arrested, and then later briefly jailed him. Plaintiff contends that this conduct constitutes false arrest and imprisonment cognizable under 42 U.S.C. §1983. Plaintiff also alleges malicious prosecution, although the facts underlying this claim are decidedly unclear.

II. DISCUSSION

I must, of course, interpret the complaint, including all facts and reasonable inferences, in the light most favorable to the plaintiff. *Harpur v. Csert*, 544 F.2d 1121, 1122 (1st Cir. 1976). "Only if it appears beyond doubt from the pleadings that the party opposing the motion can prove no set of facts which would support the claim for relief may the court grant the motion." *Lopez v. Bulova Watch Co., Inc.*, 582 F.Supp. 755, 757 (D.R.I. 1984). I am also mindful that because this is a pro se complaint, it is held to "less stringent standards than pleadings drafted by lawyers." *Sisbarro v. Warden, Mass. State Penitentiary*, 592 F.2d 1, 2 (1st Cir. 1979).

I am forced to conclude, however, even in light of these not insubstantial indulgences, that plaintiff's section 1983 action against the Town of Warwick must be dismissed for failing to allege that the actions of the officers were actuated by or stemmed from a custom or policy.

In *Monell v. Dept. of Soc. Serv.*, 436 U.S. 658 (1978), the Supreme Court rejected a straight respondeat superior theory of municipal liability for the acts of its agent and

held that "it is when *execution of a government's policy or custom,* whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the government is responsible under §1983." *Id.* at 695.

The Supreme Court has had occasion to review the sufficiency of a complaint in this regard. In *Polk County v. Dodson,* 454 U.S. 312 (1981), a pro se plaintiff had failed, as the plaintiff has in this case, to allege any policy of the municipality that arguably violated his rights. According to the Court, "even in the light of the sympathetic pleading requirements, applicable to pro se petitioners, the complaint did not describe a constitutional tort actionable under §1983."

As the Court stated, "official policy must be the 'moving force of the constitutional violation' in order to establish liability of a governmental body under §1983." *Id.* at 327 (citing *Monell,* 436 U.S. at 694); *see also Scarpe v. Murphy,* 624 F.Supp. 33, 35 (D.Mass. (1985) ("since 'the touchstone of the §1983 action against a government body is an *allegation* that official policy is responsible for a deprivation of rights protected by the constitution', a plaintiff must plead policy in his §1983 complaint.").

Plaintiff also alleges, or attempts to allege, malicious prosecution against the city. Try as I might, I am unable to understand the basis of this claim. The plaintiff appears to allege that the malicious prosecution occurred on December 14, 1984, and states that it was on this date that he was pronounced not guilty. Yet in the very next sentence he speaks of being "in State of Rhode Island custody for three years on 3000 dollars and 2000 dollars

respectively own recognizance" and further complains of having to appear in court on fifteen occasions between April 3, 1984 and May 21, 1986.

While I am willing to adhere to a less stringent standing standard of pleading for pro se litigants, I must agree with my brother Young of the district court of Massachusetts, that "this cannot be taken to mean that pro se complaints are held to no standard at all." *Green v. Com. of Mass.*, 108 F.R.D. 217, 218 (D.Mass. 1985). The controlling rule requires a short, plain statement of the claim showing that the pleader is entitled to relief. Fed.R.Civ.P. 8(a)(2). "(C)omplaints which ramble, which needlessly speculate, accuse and condemn, and which contain circuitous diatribes far removed from the heart of the claim do not comport with these goals and this system; such complaints must be dismissed. . . ." *Id.* (quoting *Prezzi v. Berzak*, 57 F.R.D. 149, 151-52 (S.D.N.Y. 1972)).

III. CONCLUSION

Accordingly, plaintiff's complaint against the City of Warwick is dismissed.

By Order

/s/ Paulette J. Dube
Clerk

Enter:

/s/ Raymond J. Pettine
Senior Judge
Nov 10/87